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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 BRUCE SCHWARTZ, individually
4 and on behalf of all others
similarly situated,

5 Plaintiff,

6 v.

14 CV 9525 KPF)

7 HSBC BANK USA, N.A.,

8 Defendant.

9 -----x

10 New York, N.Y.
February 24, 2015
11 10:20 a.m.

12 Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge

15 APPEARANCES

16 BROMBERG LAW OFFICE PC

Attorneys for Plaintiff

17 BY: BRIAN LEWIS BROMBERG

-AND-

18 HARLEY JAY SCHNALL

19 GREENBERG TRAURIG LLP

Attorneys for Defendant

20 BY: LOUIS SMITH

AARON VAN NOSTRAND

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1 THE DEPUTY CLERK: In the matter of Bruce Schwartz
2 versus HSBC Bank USA. Counsel, please identify yourselves,
3 beginning with the plaintiff.

4 MR. BROMBERG: Brian Bromberg, Bromberg Law Office PC,
5 for the plaintiff. Good morning, your Honor. Would you prefer
6 we sit or stand?

7 THE COURT: I prefer that you stand. It's just going
8 to require you to speak very clearly, near a microphone,
9 because if you sit, then I'm going to see my deputy's head
10 instead of yours.

11 MR. SCHNALL: All right.

12 THE COURT: All right, thank you.

13 MR. SCHNALL: Harley Schnall, Law Office of Harley
14 Schnall, for the plaintiff. Good morning, your Honor.

15 THE COURT: All right. Mr. Schnall, hopefully you'll
16 be able to get in earlier next time.

17 MR. SCHNALL: Yes. My apologies.

18 THE COURT: All right.

19 MR. SMITH: Good morning, your Honor. Louis Smith,
20 Greenberg Traurig, appearing on behalf of Defendant HSBC Bank
21 USA, N.A.

22 MR. VAN NOSTRAND: Good morning, your Honor. Aaron
23 Van Nostrand, also from Greenberg Traurig, on behalf of HSBC
24 Bank USA, N.A.

25 THE COURT: Let me begin with a housekeeping matter

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1 that's off the record.

2 (Discussion off the record)

3 THE COURT: Back on the record.

4 Mr. Smith, are you going to be doing the discussions
5 this morning or will Mr. Van Nostrand?

6 MR. SMITH: It will be me, your Honor.

7 THE COURT: Let's talk, please, about your
8 contemplated motion to dismiss. Part of it, sir, may be
9 obviated, for all I know, because we're going to hear from your
10 adversary soon and they wish to amend the complaint, but I want
11 to understand your view, sir, as to what issues were decided by
12 Judge Engelmayer in his case.

13 I have read the opinion, so I have views of my own but
14 I'd like to hear yours.

15 MR. SMITH: Thank you, your Honor. There was a
16 substantially similar complaint filed in that action as it
17 relates to this late fee claim --

18 THE COURT: But they returned the money because of
19 Hurricane Sandy. Why couldn't they return the money and save
20 yourself this lawsuit?

21 MR. SMITH: It would have been better; I agree, your
22 Honor, it would have saved that.

23 THE COURT: All right.

24 MR. SMITH: The relief that was sought in that case,
25 your Honor, they sought actual damages, statutory damages,

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1 injunctive relief, declaratory relief, all under TILA. And
2 what Judge Engelmayer found was that once he made the
3 determination that there was no actual damages, the rest of the
4 claim had to go and the complaint in its entirety was dismissed
5 because he found the statutory provision that they rely on in
6 this case, again, does not allow for statutory damages. And he
7 also found through his ruling -- because this relief was sought
8 in the complaint, it was briefed in the motion to dismiss --
9 that there is no injunctive relief and there is no declaratory
10 relief. These are generally well settled principles under TILA
11 as well.

12 THE COURT: Let me just talk a little more about what
13 you have just said. I might well agree with you that the issue
14 of whether there are statutory damages available may have been
15 decided by Judge Engelmayer because it was necessary to his
16 decision and it does seem to be strikingly similar factuals,
17 facts alleged, just a different date. But when it came time
18 for the discussion of actual damages, what he said was, I can't
19 find any actual damages because they have refunded this money
20 and therefore I'm not going to find out actual damages, I'm not
21 going to grant injunctive relief, I'm not going to give any
22 declaratory relief.

23 Here, based on our initial exchange this morning,
24 there was a late fee imposed of some sort that was not
25 refunded, and I imagine there may have been an interest charge

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1 for the late payment. So I can't really say that Judge
2 Engelmayer's decision gives me a result that I must rely on on
3 these other issues, correct? Isn't this case basically what
4 would have happened in Judge Engelmayer's litigation if only
5 there hadn't been the repayment of fees?

6 MR. SMITH: But in Judge Engelmayer's case, had Judge
7 Engelmayer felt that there would have been an opportunity for
8 injunctive relief or declaratory relief, whether there was
9 actual damages or not, he could have said, okay, look, you have
10 no actual damages, that's out of the case, I find you don't
11 have statutory damages, because he explains that in his ruling
12 and his reasoning under TILA, but he could have said, but I'm
13 going to let you go forward and try to get declaratory relief,
14 try to get injunctive relief under TILA because those are still
15 avenues that are available.

16 He didn't do that. He said --

17 THE COURT: No, but I thought he didn't do that
18 because he found an absence of actual damages. Wouldn't that
19 have impugned the standing of Mr. Schwartz to have made these
20 claims for declaratory relief and injunctive relief because
21 there was no injury that could be redressed by the lawsuit
22 before Judge Engelmayer?

23 MR. SMITH: I didn't see it as hinging on the actual
24 damages point. I saw it as the determination that this, just
25 like statutory damages, wasn't a category of relief available

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1 to the plaintiff, likewise injunctive relief, likewise
2 declaratory relief. And these are principles that are not
3 controversial in the context of TILA. We would submit there's
4 well-established law in this area.

5 THE COURT: Okay. Let me understand, please, the
6 breach of contract claims that you seek dismissed.

7 MR. SMITH: To sort of frame the context, again, going
8 back to the prior case, in the original complaint that was
9 filed in the case before Judge Engelmayer, they asserted a
10 substantially similar breach of contract claim, basically
11 saying that there is an agreement in the contract that says
12 federal law controls and, by charging a late fee, that
13 agreement was breached. Unlike in this case, where we're doing
14 a pre-motion conference, we just filed our motion to dismiss.
15 Part of that motion included the card member agreement, so the
16 plaintiff then received the card member agreement. Our
17 argument was a very simple one, which is basically set forth in
18 the letter I sent to your Honor, that these terms don't exist
19 in the contract and you need to point to specific terms, you
20 can't here, and therefore there's no basis for the claim.

21 In response to our motion to dismiss, the first motion
22 to dismiss, the plaintiff amended the complaint. In the
23 amended complaint, they completely dropped the breach of
24 contract claim. We understood from that that they saw there
25 really was no validity or basis to the breach of contract

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1 claim, it did not contain the provisions that they alleged in
2 the complaint, and therefore in the amended pleading, that
3 disappeared from the case.

4 THE COURT: I'm sorry, just to be clear, this is in
5 the Judge Engelmayer case?

6 MR. SMITH: Correct.

7 THE COURT: Thank you. But here we are in my case.

8 MR. SMITH: Here we come back to your case now and,
9 again, now this claim again appears. So the allegation of the
10 provision in the contract is on information and belief. So the
11 allegation is on information and belief even though the
12 contract was part of the record in the first case, there has
13 been some amendment to the contract but nothing that's going to
14 change the analysis here.

15 THE COURT: And just so I am clear, your position
16 would be that the document, the card member agreement or the
17 contracts that you provided to Judge Engelmayer, are
18 necessarily implicated by the pleading such that it would not
19 be beyond the scope of 12(b)(6) for me to review it in
20 connection with a motion to dismiss?

21 MR. SMITH: Exactly. And Judge Engelmayer made
22 precisely that finding. And there's a Second Circuit case that
23 talks about, even in the context of TILA, that you can look at
24 these agreements and the like. And here, they're plainly
25 relying on it because they're saying they have a breach of

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1 contract claim and they're pointing to alleged provisions in
2 the agreement itself.

3 So, again, from our view, it's quite simple: Here's
4 the agreement, here's what they're alleging, it's not in the
5 agreement, there's no basis for the claim, the claim should be
6 dismissed.

7 THE COURT: Okay. Now, at some point I am going to
8 let the folks at the front table talk, and when they do,
9 they're going to explain this to me but they have indicated to
10 me in their responsive letter that they want an opportunity to
11 amend, to correct, any deficiency. So obviously we're going to
12 have to, at least for a couple of weeks, table discussion of
13 your motion to dismiss to see if the problems you've identified
14 can be or not remedied by an amended pleading.

15 Is it your contention, sir, that there is no
16 allegation that can be pled consistent with the card member
17 agreement that would support a breach of contract claim?

18 MR. SMITH: That is correct, your Honor. Their claim,
19 to the extent they have any claim that they can allege, is
20 going to be based on TILA, it's not going to be based on the
21 card member agreement.

22 THE COURT: Okay. Let's also talk about your third
23 point, which is, you believe that the class claims should be
24 stricken. Now, do you mean in their entirety or only insofar
25 as -- well, let me hear from you.

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1 MR. SMITH: We just focused on a very narrow point and
2 it's the start date of the class period, because they included
3 dates in 2008, 2009. It wasn't really clear to us why the
4 dates would vary but there were two different dates that were
5 included there. But what we thought the thinking behind it
6 was, was relating to the breach of contract aspect because
7 you're going back in time and in considerable ways, and with
8 TILA it's a one-year statute of limitations, that's it.

9 So if we have a case that's going forward, to the
10 extent the case goes forward, it, in our view, will go forward
11 limited to TILA. And if you're dealing with a TILA case, it's
12 a one-year statute of limitations; there's no reason to be
13 defining a class going back to 2008, 2009, and creating all
14 that additional complexity that goes along with a length in
15 class period.

16 THE COURT: Okay. I'm going to hear from the folks at
17 the front table and then I will come back to you if I have any
18 questions. Thank you.

19 MR. SMITH: Thank you, your Honor.

20 THE COURT: Mr. Schnall, I will be hearing from you,
21 sir?

22 MR. SCHNALL: Yes.

23 THE COURT: Why don't we begin at the beginning. You
24 heard me talk with Mr. Smith about basically my read of Judge
25 Engelmayer's decision in the prior case. What is your view as

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1 to whether any issues are given preclusive effect by his
2 decision?

3 MR. SCHNALL: Well, frankly, we don't think any of the
4 issues are given preclusive effect.

5 THE COURT: Not even statutory damages?

6 MR. SCHNALL: Not even statutory damages.

7 THE COURT: May I ask why that is, sir?

8 MR. SCHNALL: Well, the case with Judge Engelmayer was
9 quite unique circumstances. As your Honor mentioned, the fee
10 was refunded as a result of Superstorm Sandy and it took the
11 case out of what we felt would be a viable case.

12 In another respect, the case differs in that in
13 Schwartz there were no interest charges. I believe there was a
14 zero percent interest rate applicable to his account. So there
15 was just a late fee and then that late fee was refunded.

16 Here we have not only a late fee but a late posting of
17 the payment three days later. And it was received, according
18 to U.S. Postal Service records, and that's why the breach of
19 contract claim, we believe, also will stand here. They're
20 different circumstances than the case with Judge Engelmayer.

21 THE COURT: Let's break those apart, please, for a
22 second.

23 I didn't see anything in Judge Engelmayer's discussion
24 of statutory damages that suggested that his decision hinged on
25 the particular events involving Superstorm Sandy, I didn't but,

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1 okay, I'll look at it. But your view is that these were sort
2 of a sui generis set of facts and that his decision should be
3 read only in connection with that series of facts?

4 MR. SCHNALL: Or we would make that distinction, even
5 if he didn't.

6 THE COURT: I'll just tell you now, you have stronger
7 arguments in your arsenal for other areas of your complaint
8 than that one. Just know that that's one that's going to be
9 interesting and I'm not really moved by it but, okay, we'll
10 see.

11 MR. SCHNALL: The fee was refunded. The question
12 remains whether Schwartz -- the title violation is whether a
13 payment was treated as late. And, yes, the fee was refunded
14 but because of the unusual circumstances in the case, we didn't
15 pursue it. Perhaps Mr. Schwartz's account was treated as late
16 and there are implications to that. When one is marked as
17 late, the next late fee is an enhanced late fee.

18 THE COURT: But, sir, you just said something I want
19 to focus on, you said perhaps we didn't pursue that. What do
20 you mean?

21 MR. SCHNALL: Well, because the case was so unusual in
22 that the fee was refunded because of Superstorm Sandy, we did
23 not know whether Mr. Schwartz's account was really affected at
24 all.

25 THE COURT: Okay.

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1 MR. SCHNALL: In this case, we intend to show that it
2 was affected in a number of ways. First and foremost, there is
3 a late fee and his payment was treated as late.

4 THE COURT: Okay. Keep going.

5 MR. SCHNALL: In addition to that, there is, again,
6 the failure to post the payment on the date that it was
7 received. So not only is there the late fee, but there is the
8 violation of not posting the payment, payments received by
9 5:00 p.m., under the statute.

10 THE COURT: Okay. Shall we switch to your breach of
11 contract claim?

12 MR. SCHNALL: Sure.

13 THE COURT: Mr. Smith advises me that I should not be
14 looking at TILA in this instance, and I am not, I should be
15 looking at the contract. And I presume the contract is the
16 card member agreement. Is there something else that you're
17 looking at? Basically, what is the source of the contract
18 claims that you're now alleging? Let me stop for a moment.
19 I'm sorry.

20 You've indicated a desire to amend your pleadings.
21 What are you going to amend to basically remedy or address
22 issues that have been raised by the defendant's letter?

23 MR. SCHNALL: Well, we are going to, for one thing,
24 add an additional Truth In Lending claim that we have
25 discovered.

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1 THE COURT: And that is what, sir?

2 MR. SCHNALL: I'm sorry?

3 THE COURT: That is what, sir?

4 MR. SCHNALL: It's a disclosure of violation that the
5 defendants have made on Mr. Schwartz's statements totally apart
6 from this violation here.

7 THE COURT: And this is something that you knew about?
8 How did you not know this at the time you filed the original
9 complaint?

10 MR. SCHNALL: Because it was on a different periodic
11 statement and it came up in review of Mr. Schwartz's statements
12 when he made them available.

13 THE COURT: Okay. Go ahead, please continue.

14 MR. SCHNALL: So we intend to amend to add a Truth In
15 Lending claim, we intend to amend to clarify the breach of
16 contract claim, and we are looking into amending under other
17 consumer statutes.

18 THE COURT: Okay. Now, again, focusing on the breach
19 of contract claim, again, what is the breach, sir? What
20 provisions were breached?

21 MR. SCHNALL: Well, first, the agreement provides that
22 HSBC would abide by federal law. And federal lending law
23 requires that a payment that comes in the day after a holiday
24 by mail is not to be treated as late if the due date was the
25 holiday.

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1 In addition, the agreement makes reference to
2 instructions on the billing statements, how to make payments.
3 So we believe that the agreement incorporates the periodic
4 statements by reference.

5 THE COURT: And from that, you discern what, sir? I
6 need you to connect the dots on that last part.

7 MR. SCHNALL: That HSBC was required to, or HSBC
8 committed to, crediting payments by a certain cutoff time and
9 they did not credit the payment made by Mr. Schwartz.

10 THE COURT: As to the former of your breach of
11 contract claims -- I just want to make sure I understand it --
12 what I think you're saying is, having committed in this
13 agreement to abiding by federal law, the violations that you
14 allege of the Truth In Lending Act are necessarily, in addition
15 to being violations of federal law, breaches of the contract
16 and specifically that provision where they said they would
17 abide by federal law?

18 MR. SCHNALL: Yes. Plus, they also allowed for more
19 generous cutoff time for federal law in the billing statements.
20 And we believe that's part of the agreement, and they breached
21 the contract there.

22 THE COURT: Okay. And then can you talk a little bit
23 about the class allegations that you wish to keep and, in
24 particular, what Mr. Smith was saying about the one-year
25 statute of limitations for Truth In Lending Act classes or

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1 claims?

2 MR. SCHNALL: Well, yes, there is a one-year statute
3 of limitations --

4 THE COURT: Okay.

5 MR. SCHNALL: -- strictly on the Truth In Lending
6 claim. So we would agree that would apply.

7 THE COURT: Okay. And would you modify the
8 allegations in your complaint to make clear -- the class that
9 you seek is a class of individuals who suffered violations of
10 the Truth In Lending Act or suffered injuries as a result of
11 defendant's purported violations of the Truth In Lending Act
12 and not, for example, a class of people whose contracts were
13 breached? Or are you doing both?

14 MR. SCHNALL: We are doing both. They coincide, the
15 claims, to a great degree.

16 THE COURT: But how far back are you looking for this
17 class?

18 MR. SCHNALL: We're going back to the statute of
19 limitations on breach of contract because we believe that the
20 claims are coincidental.

21 THE COURT: Okay, all right. Are there other
22 amendments that you contemplate making to your complaint?

23 MR. SCHNALL: None other than I've described.

24 THE COURT: Okay. And do you agree that you are not
25 within the period of amendment as of right, that this is

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1 something that would have to be addressed either by order of
2 the Court or perhaps with the consent of the parties in a
3 stipulation, right? The real issue, sir, is -- I'm going to be
4 talking to your adversary in a moment and I am going to see how
5 he feels about your proposed amendments -- you don't believe
6 that you can just make them as of right; is that correct?

7 MR. SCHNALL: I'm not sure, because we are --
8 defendants haven't answered yet but --

9 MR. BROMBERG: Your Honor, if I may?

10 THE COURT: Yes, please.

11 MR. BROMBERG: Just for the record, Brian Bromberg.

12 Two points: First of all, with respect to the statute
13 of limitations, the statute of limitations for the breach of
14 contract claim, we believe, it would either be state by state,
15 like six years for New York or various statute of limitations
16 for the other states, or it would possibly be the three-year
17 Delaware statute of limitations for breach of contract. I
18 guess that matter would have to be decided as a result of the
19 various motions on the case, probably at the point of class
20 certification.

21 THE COURT: Yes.

22 MR. BROMBERG: With respect to the breach of contract
23 claim, I just want to make one thing clear: The reason we
24 withdrew the breach of contract claim on the other case had to
25 do with the fact that when the money was refunded as a result

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1 of Superstorm Sandy, we no longer had actual damages. Without
2 actual damages, you can't make a breach of contract claim.
3 Here we have actual damages. So that's a large part of the
4 reason why there's a breach of contract claim here that we're
5 not withdrawing.

6 THE COURT: Sir, just so I am clear, what are the
7 actual damages? What was the late fee that was assessed on
8 Mr. Schwartz's account?

9 MR. BROMBERG: Oh, that was \$25, your Honor.

10 THE COURT: And was there an interest charge?

11 MR. BROMBERG: I'd have to -- there was some interest
12 charge, yes, and we'd have to -- three days' worth of interest.

13 THE COURT: Do you know how much that amounted to,
14 sir?

15 MR. SCHNALL: In the neighborhood of a dollar.

16 MR. BROMBERG: In the neighborhood of a dollar, your
17 Honor.

18 THE COURT: So he has actual damages of \$26?

19 MR. BROMBERG: Roughly, yes.

20 THE COURT: I understand you believe that he has
21 statutory damages and that there are a whole class of people
22 who fit into the parameters that you're identifying for him,
23 but just I wanted to understand what we're dealing with, with
24 him.

25 MR. BROMBERG: Yes. Well, your Honor, the Seventh

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1 Circuit said only a mad man would sue on an individual basis
2 for \$20. So that's the reason why we're here as a class
3 action. I think it was Judge Posner maybe Judge Easterbrook.

4 THE COURT: Frequently confused, sir.

5 MR. BROMBERG: Yes.

6 THE COURT: No, that's fine. I'm just saying, given
7 the experience that Mr. Schwartz had previously, it is
8 surprising that he has not learned to pay his statements on
9 time, but I guess that's why we're here.

10 MR. BROMBERG: No, with respect to the time for the
11 12(b)(6) amendment, ordinarily, I believe there's ten or
12 fifteen days -- actually, it's been adjusted to weeks now, so I
13 believe it's 14 days after the 12(b)(6) motion, that we have a
14 right to amend as of right.

15 THE COURT: Okay.

16 MR. BROMBERG: I don't know whether that would date
17 from the date of the premotion conference letter or date from
18 the date of the actual --

19 THE COURT: I think it actually dates from the actual
20 motion being made, but let me just try and subvert the whole
21 discussion.

22 Mr. Smith, do you consent to their amending?

23 MR. SMITH: Yes, your Honor.

24 THE COURT: Okay. Then we don't have to worry about
25 this at all. Thank you, Mr. Smith.

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1 MR. SMITH: Yes, Judge.

2 THE COURT: How quickly can we see your amended
3 complaint?

4 MR. BROMBERG: I believe that we might need 30 days,
5 your Honor.

6 THE COURT: 30 days? Really?

7 MR. SCHNALL: Well, we need to investigate this other
8 new claim that's popped up and the consumer statute as well a
9 little further and we want to make sure we get it right.

10 THE COURT: I will do this, but let the record reflect
11 my complete stupefaction that you need that much time to do it.
12 I will do it but I think that's ludicrous.

13 MR. SCHNALL: I'm sorry, your Honor. There's also
14 some -- it's just that I'm in the middle of a cert petition --

15 THE COURT: Then at least be honest with me. Don't
16 say it's because of this case and the difficulties of this
17 case. It's because you've got other things going on that you
18 consider to be more important than this. This is not a wise
19 thing to suggest to me but at least it's an honest one.

20 So by March 27th, because I'll give you to the Friday,
21 we will have your amended complaint.

22 Mr. Smith, I don't want to presuppose anything --
23 gentlemen, you may sit down -- but I have a sneaking suspicion,
24 sir, that upon seeing this amended complaint, you will
25 nonetheless wish to move for some form of dismissal as to some

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1 part of the complaint. So I don't want to delay the
2 proceedings in this case unnecessarily by having another round
3 of premotion submissions and a discussion before me. If you
4 tell me that actually there's a high likelihood that you won't
5 move to dismiss, then that's great but I think you're not going
6 to be able to say that.

7 MR. SMITH: I am not. And I think in light of the
8 description we've got of where they're going, there's an
9 extremely high likelihood that we will move in response to the
10 complaint.

11 THE COURT: Can I have your motion by the 1st of May?

12 MR. SMITH: Yes, your Honor.

13 THE COURT: Can I have the opposition from the
14 plaintiffs by the 1st of June?

15 MR. BROMBERG: Yes, your Honor.

16 THE COURT: Okay. And can I have the reply, if any --
17 and I am not saying you have to do one -- by the 15th?

18 MR. SMITH: Yes, your Honor.

19 THE COURT: Great.

20 Mr. Schnall and Mr. Bromberg, would you consider,
21 while you're amending, adding some of the documents that you
22 think are the contracts as exhibits to your complaint?
23 Certainly the defendants can bring them up in their motion but
24 I just wonder whether you might want to include them to show me
25 specifically what you're looking at when you can find

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1 contractual provisions that you believe were breached.

2 MR. BROMBERG: Yes, your Honor.

3 THE COURT: At least consider it?

4 MR. BROMBERG: No, no, absolutely.

5 THE COURT: All right. Let me go back to my notes,
6 then, and see if there's anything else we should be looking
7 about today.

8 I think that's all I've got. Mr. Bromberg,
9 Mr. Schnall, is there -- wait, we have someone standing.
10 Mr. Smith, is there something else you want to raise, sir?

11 MR. SMITH: Your Honor, there is a conference
12 scheduled before your Honor for next Wednesday an initial
13 conference.

14 THE COURT: We will take that off the calendar. Let
15 the record reflect that that conference has been adjourned. I
16 think I'll have to do something a little bit more
17 minute-order-like for the court, but we will take the
18 conference off because, you're right, while I'd love to see you
19 all again, it would take time away from the work that you're
20 doing in trying to move this case forward, so I won't do that.

21 MR. SMITH: Thank you very much, your Honor.

22 THE COURT: Thank you for reminding me of that.

23 Anything else, Mr. Smith?

24 MR. SMITH: No, your Honor. That's all.

25 THE COURT: Anything else, Mr. Bromberg or

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1 Mr. Schnall?

2 MR. BROMBERG: Just to make it clear, with respect to
3 the controlling contract, I guess we're going to get on the
4 phone with defense counsel and make sure we're all in agreement
5 as to which contract governs here before we attach it, because
6 they were mentioning before that there had been some
7 amendments.

8 THE COURT: I think that makes sense. I presume that
9 there is a document that was in effect at the end of last year,
10 when these issues arose and when these charges were imposed.
11 So my assumption is, it's whatever contract was in place at
12 that time but perhaps you two may come to a different
13 conclusion.

14 MR. BROMBERG: The question is, we heard about some
15 amendments, I wanted to make sure we're all in agreement as to
16 which contract governed.

17 THE COURT: Okay.

18 MR. BROMBERG: We have a pretty good relationship,
19 things went fine on the last case. We lost but that's life.

20 THE COURT: Okay.

21 Mr. Smith, is there an agreement that you believe is
22 operative at this time?

23 MR. SMITH: Yes, your Honor.

24 THE COURT: All right.

25 MR. SMITH: Your Honor, we had filed in the prior case

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1 before Judge Engelmayer a document number 9 on the ECF docket,
2 attached to a declaration, the agreement. As I indicated
3 earlier, it was updated and we will provide the updated version
4 of the agreement to counsel shortly.

5 THE COURT: Great.

6 And let me ask the parties as well to please get a
7 copy of this transcript. It would help me a lot, when I get
8 the actual briefing, to look back on what the parties were
9 arguing at the time we were discussing this. You do not need
10 to get it in an expedited fashion but by the time I get the
11 amended complaint, it might be necessary to have the
12 transcript, so basically in the ordinary course.

13 Anything else today, gentlemen?

14 MR. BROMBERG: No, your Honor.

15 THE COURT: All right.

16 Mr. Van Nostrand, perhaps next time they'll let you
17 talk.

18 MR. VAN NOSTRAND: Nothing from me, your Honor. Thank
19 you, your Honor.

20 THE COURT: Excellent. Let him talk next time. Thank
21 you very much, all, for coming in today.

22 COUNSEL: Thank you, your Honor.

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